STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

IN THE SUPERIOR COURT OF LAKE COUNTY
CIVIL DIVISION, ROOM NUMBER FOUR
SITTING AT GARY, INDIANA

ERIC PORTERFIELD,

Plaintiff

-vs-

CAVANAUGH'S SPORTS BAR & EATERY, LTD.,

Defendant

CAUSE NO. 45D04-0710-CT-00288

PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT, CAVANAUGH'S SPORTS BAR & EATERY, LTD.

I.
Procedural Background

Plaintiff, Eric Porterfield, (hereinafter "Eric"), filed his Second Amended Complaint herein naming as the sole defendant in this case Cavanaugh's Sports Bar & Eatery, Ltd., ("Cavanaugh's"), **[See: Plaintiff's Second Amended Complaint, Defendant's Designation of Evidence, Defendant's Exhibit 3].** Eric alleges that he is permanently disabled because he was rendered blind as a result of injuries he sustained in an altercation in the parking lot at closing time of the bar operated by Cavanaugh's in Schererville, Lake County, Indiana. Cavanaugh's has filed its Motion for Summary Judgment alleging that it did not owe a duty to Eric because the incident giving rise to this litigation involved a criminal attack from a third party that was unforeseeable. **[See: Cavanaugh's Brief in Support of Motion for Summary Judgment, Section B, p. 8].** Eric now files his reply.

II.

A. Legal Standard for Granting Summary Judgment

The Indiana Court of Appeals very recently reiterated the well-settled standard for

granting summary judgment when it observed that summary judgment is appropriate only if, after drawing all reasonable inferences in favor of the non-moving party, the designated evidence shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); *Hamilton v. Steak 'n Shake Operations, Inc.*, 92 N.E.3d 1166, 1169 (Ind.Ct.App. 2018). The party moving for summary judgment, in this case Cavanaugh's, has the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party, in this case Eric. *Id.* In a summary judgment context, a fact is "material" if the resolution of that fact would affect the outcome of the case, and an issue is "genuine" if the trier of fact is required to resolve the differing accounts of the parties, or if undisputed material facts support conflicting reasonable inferences. *Hamilton v. Steak 'n Shake Operations, Inc., supra*, at p. 1169.

B. Analytical Framework To Be Used By A Court When Evaluating Foreseeability In The Context Of The Duty A Landowner Owes To An Invitee In Negligence Actions

Cavanaugh's asserts that it owed no duty to Eric on December 10, 2006, because the altercation that resulted in him losing his eyesight was unforeseeable. Cavanaugh's designated evidence includes the versions of several participants in the incident and an affidavit from its expert. However, under the analytical framework adopted by our Supreme Court in *Goodwin v. Yeakle's Sports Bar & Grill, Inc., supra*, the facts and circumstances surrounding the ***actual occurrence*** in this case are not relevant to whether Cavanaugh's owed a duty to Eric.

In discussing the most appropriate framework for assessing foreseeability in the context of duty, our Supreme Court, quoting *Goldsberry v. Grubbs*, 672 N.E.2d 475 (Ind.Ct.App. 1996), confirmed that:

> "[T]he foreseeability component of the duty analysis ***must*** be something different than the foreseeability component of proximate cause. More precisely, ***it must be a lesser inquiry***; if it was the same or a higher inquiry it would eviscerate the proximate cause element of negligence altogether. If one were required

> to meet the same or higher burden of proving foreseeability with respect to duty, then it would be unnecessary to prove foreseeability a second time with respect to proximate cause. ***Additionally, proximate cause is normally a factual question for the jury, while duty is usually a legal question for the court.*** As a result, the foreseeability component of proximate cause requires an evaluation of the facts of the actual occurrence, while ***the foreseeability component of duty requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence."*** *Goodwin,* 62 N.E. 3rd at p. 390, quoting *Goldsberry v. Grubbs*, supra, emphasis added.

The *Goodwin* Court then determined that *Goldsberry* "**. . .** provides the more accurate framework for assessing foreseeability in the duty context." *Id.* at p. 391. Accordingly, as in this case, when determining the question of foreseeability in the context of duty, a court is tasked ". . . with engaging in a general analysis of the broad type of plaintiff and harm involved ***without regard to the facts of the actual occurrence.***" *Id.* at p. 394, emphasis added.

III.

Statement of Facts Material to Cavanaugh's Motion for Summary Judgment

Mindful of the analytical framework articulated by the ***Goodwin*** Court for assessing foreseeability in the duty context, Eric respectfully submits that the general facts material to Cavanaugh's Motion for Summary Judgment on the issue of duty are simple and straightforward: On December 10, 2006, Eric was a patron and invitee at Cavanaugh's Bar in Schererville, Indiana, **[See: Deposition of Eric Porterfield, attached hereto and marked Plaintiff's Exhibit 1, p. 31, l. 3-10; p. 51, l. 14-16].** In the same calendar year that Eric was injured, 2006, there were five (5) incidents in which the Schererville Police Department was called to Cavanaugh's because of fights in the parking area, between 3:00 a.m. and 3:30 a.m., shortly after closing time, on a late week/weekend morning. Those incidents in 2006, before the actual occurrence in which Eric was injured on December 10, 2006, are as follows:

Incident No. 1, January 6, 2006: Early in the morning of Friday, January 6, 2006, [1] at

[1] Pursuant to Rule 201, Indiana Rules of Evidence, Eric respectfully requests that this Honorable Court take judicial notice of the fact that January 6, 2006, was a Friday; January 28, 2006, was a Saturday; January 29, 2006,

3:19 a.m., the Schererville Police were dispatched to Cavanaugh's regarding an "altercation" in the parking lot, **[See: Schererville Police Report dated January 6, 2006, attached hereto and marked Plaintiff's Exhibit 2; Deposition of Corporal Michael A. Vode, attached hereto and marked Plaintiff's Exhibit 7, p. 106, l. 18-25 - - p. 107, l. 1-16].**[2]

Incident No. 2, January 28, 2006: Early in the morning of Saturday, January 28, 2006, at 3:31 a.m., the Schererville Police were dispatched to Cavanaugh's regarding a "large fight" in the parking lot, **[See: Schererville Police Report dated January 28, 2006, attached hereto and marked Plaintiff's Exhibit 3; Deposition of Corporal Michael A. Vode, attached hereto and marked Plaintiff's Exhibit 7, p. 109, l. 10-25].**

Incident No. 3, January 29, 2006: Early in the morning of Sunday, January 29, 2006, at 3:18 a.m., the Schererville Police were dispatched to Cavanaugh's regarding "a fight in progress in the parking lot at Cavanaugh's", **[See: Schererville Police Report dated January 29, 2006, attached hereto and marked Plaintiff's Exhibit 4; Deposition of Corporal Michael A. Vode, attached hereto and marked Plaintiff's Exhibit 7, p. 110, l. 10-25 - - p. 111, l. 1-4].**

Incident No. 4, September 17, 2006: Early in the morning of Sunday, September 17, 2006, at 3:05 a.m., the Schererville Police were dispatched to Cavanaugh's "for a fight in progress", [**See: Schererville Police Report dated September 17, 2006, attached hereto and marked Plaintiff's Exhibit 5; Deposition of Corporal Michael A. Vode, attached hereto and marked Plaintiff's Exhibit 7, p. 111, l. 15-25 - - p. 112, l. 1-13].**

Incident No. 5, October 1, 2006: Early in the morning of Sunday, October 1, 2006, at 3:07 a.m., the Schererville Police responded to a report of a "physical fight involving twenty unknown subjects," **[See: Schererville Police Report dated October 1, 2006, attached hereto and marked Plaintiff's Exhibit 6; Deposition of Corporal Michael A. Vode, attached hereto and marked Plaintiff's Exhibit 7, p. 113, l. 1-22].**

There is no dispute that the altercation resulting in Eric's permanent injuries occurred at Cavanaugh's closing time at about 3:00 a.m. early in the morning of Sunday, December 10,

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was a Sunday; September 17, 2006, was a Sunday; October 1, 2006, was a Sunday; and December 10, 2006, was a Sunday. **[See: Calendars for January, 2006; September, 2006; October, 2006; and December, 2006, attached hereto and marked Plaintiff's Group Exhibit 8].**

[2] The January 6, 2006 Schererville Police Department Report, designated herein as Plaintiff's Exhibit 2, was a record completed in the normal course of business by the Schererville Police Department, **[See: Deposition of Corporal Michael A. Vode, attached hereto and marked Plaintiff's Exhibit 7, p. 108, l. 3-7].** The same is true for all of the Schererville Police Departments Reports designated herein.

2006. **[See: Cavanaugh's Brief in Support of Motions for Summary Judgment, p. 2, Section B. 1.]**

IV.

Argument

A. Using the *Goodwin* Court's analytical framework for assessing foreseeability in the duty context, when a bar has five previous incidents in the same calendar year in which local police have to be called because of fights in the parking lot at closing time, an injury to a bar patron caused by a another fight in the parking lot at closing time in the same calendar year is a foreseeable event, thereby imposing upon the bar a duty to use reasonable care for their patrons' protection in the parking lot at closing time.

Our Supreme Court in *Goodwin* has provided courts in our state the framework to be used in determining foreseeability in the duty context. Rather than looking at the facts surrounding the actual occurrence in question, in a duty context the issue of foreseeability must be determined from a much broader view. In this case, Eric respectfully submits that this Honorable Court must determine whether, in a broader view, an injury to a bar's patron as the result of a fight in the parking lot at closing time is reasonably foreseeable when that bar has had five previous incidents, in the same calendar year, requiring the police being called, due to fights in the parking lot at closing time.

Eric respectfully submits that by any standard, five fights in the same calendar year, in the same bar's parking lot, at closing time, requiring police calls, is not an insubstantial number of incidents. Indeed, if courts in our state do not impose upon bar owners the duty to use reasonable care for the protection of its patrons at closing time after there have been five incidents where police had to be called due to altercations in the parking lot at closing time, when, if ever, will such a duty be imposed?

The *Goodwin* Court indicated that imposing a blanket duty on proprietors to afford protection to their patrons would make proprietors insurers of their patrons' safety which is contrary to the public policy in our state. *Goodwin*, 62 N.E.3rd at p. 394. Eric acknowledges and does not dispute that policy. However, just as it is not the public policy of this state to make proprietors insurers of their patrons' safety, Eric respectfully submits that it cannot be the public

policy of our State to provide virtual immunity to Cavanaugh's and other proprietors in cases in which there have been such a frequency of incidents in the same calendar year.

Moreover, it bears mentioning that the incident in *Goodwin* involved one of the patrons pulling a gun and shooting another patron. Certainly, on its face, it is understandable how difficult it would be to impose upon the proprietor of a bar a duty of protection from this type of incident. Most would agree that being required to anticipate the use of a firearm by a patron imposes a difficult standard on bar owners. Indeed, the *Goodwin* Court concluded that ". . . although bars can often set the stage for rowdy behavior, we do not believe that bar owners routinely contemplate that one bar patron might suddenly shoot another." *Goodwin*, 62 N.E.3rd at p. 393-394.

However, the situation in this case is qualitatively and quantitatively different than *Goodwin.* Eric wasn't shot, he was beaten resulting in the loss of his eyesight. In addition, Eric submits that a bar, having had the history of five incidents in its parking lot at closing time in the same calendar year, should foresee that there is an elevated risk to the safety of its patrons who are leaving through the parking lot at closing time.

Disregarding the facts of the actual occurrence on December 10, 2006, as a court must when applying the analytical framework articulated by our Supreme Court in *Goodwin*, Eric respectfully submits that in a duty context, it was foreseeable that a patron of Cavanaugh's could be injured in an altercation in its parking lot at closing time after there had been five such incidents requiring police calls in the same calendar year. [3]

[3] Although the facts of the actual occurrence resulting in Eric's injuries are not to be considered in the analytical framework articulated in *Goodwin*, Eric does not want to leave this Honorable Court with the impression that he agrees with the versions of the incident advanced by Cavanaugh's, which has designated evidence detailing the versions of several of those individuals who attacked Eric. Eric denies those versions and, for the record, testified under oath that he had nothing to drink in the evening of the incident; he was leaving Cavanaugh's at closing time with one of his friends; as he walked through the parking lot, he turned around to see his friend surrounded by a group of males; he went back to where his friend was surrounded by those males and asked them to leave his friend alone; when the males turned around and addressed him, Eric, assuming all of the others had been drinking, informed those males that he didn't want any trouble because it was late and he and his friend were leaving, **[See: Deposition of Eric Porterfield, attached hereto and marked Plaintiff's Exhibit 1, p. 34, l. 22-24; p. 55, l. 3-4; p. 55, l. 9-25 - - p. 56, l. 1-21].** Unfortunately, Eric's effort to extricate his friend from the confrontation was unsuccessful, and the incident resulting in his injuries ensued.

B. The evidence designated by Cavanaugh's in its Motion For Summary Judgment, including the affidavit of its expert, refers to the "facts of the actual occurrence" on December 10, 2006 that may be relevant to the foreseeability component of proximate cause, but are not relevant to the analysis of the foreseeability component of duty that was adopted by the Indiana Supreme Court in *Goodwin.*

Cavanaugh's has designated to this Honorable Court evidence involving the various versions of the altercation in which Eric was injured and the affidavit of its expert that purportedly evaluates the facts of the actual occurrence. While those facts may be relevant to the trier of fact in the determination of proximate cause, *Goodwin*, 62 N.E.3d 384 at p. 390, quoting *Goldsberry v. Grubbs*, *supra*, the foreseeability component of duty must be something different than the foreseeability component of proximate cause. **Id.** As stated herein, the *Goodwin* Court determined that the ***foreseeability component of proximate cause*** requires an evaluation of the facts of the actual occurrence, while the ***foreseeability component of duty*** requires a more general analysis of the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence. **Id.** Accordingly, the facts and circumstances surrounding the actual occurrence on December 10, 2006, are not relevant to this Court's analysis of whether Cavanaugh's owed to Eric a duty of care for his safety. Instead, those facts are relevant to proximate cause, and the issue of foreseeability as it pertains to proximate cause has long been held to be a question of fact for the jury to decide. *Goodwin,* 62 N.E.3d at p. 389.[4]

To be sure, Cavanaugh's is entitled to its day in court to argue the issues of breach of duty and proximate cause, and counsel for Eric has no doubt that Cavanaugh's will advance vigorous arguments on those issues. However, since Cavanaugh's argument and designated evidence pertain to the actual occurrence on December 10, 2006, its assertion that it is entitled to summary judgment on the broader issue of duty must fail, and this Honorable Court should deny Cavanaugh's Motion for Summary Judgment.

[4] While the opinions of Cavanaugh's expert regarding the reasonableness of Cavanaugh's conduct could be relevant at trial, the issue of whether Cavanaugh's breached the duty it owed to Eric likewise presents a question of fact that must be determined by the jury and not by this Honorable Court in these summary judgment proceedings. *Smith v. Walsh Construction Company II, LLC*, 2018 WL 794801 (Ind.Ct.App. 2018).

V.

Conclusion

For the above and foregoing reasons, Eric respectfully requests that this Honorable Court deny Cavanaugh's Motion for Summary Judgment.

Respectfully submitted,

SARKISIAN LAW OFFICES
Attorneys for Plaintiff

By:

A. Leon Sarkisian

CERTIFICATE OF SERVICE

I certify that on the 16th day of April, 2018, service of a true and complete copy of the above and foregoing pleading was made upon each party or their attorney of record herein by depositing the same in the United States mail in an envelope properly addressed to each of them and with sufficient first-class postage affixed and/or by third-party commercial carrier and/or by facsimile and/or by electronic mail and/or by hand delivery.

Respectfully submitted,

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